

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Yon Bivens, :
 :
Plaintiff, :
 :
v. : Case No. 2:05-cv-0445
 :
Jeff Lisath, et al., : JUDGE GRAHAM
 :
Defendants. :

ORDER

The Magistrate Judge has issued a Report and Recommendation recommending denial of defendants' motion to dismiss the complaint on exhaustion grounds. Defendants have objected to that recommendation. For the following reasons, and after a *de novo* review of the matter, the objections will be overruled.

The Magistrate Judge had concluded that, under controlling Sixth Circuit precedent, see Boyd v. Corrections Corp of America, 380 F.3d 989 (6th Cir. 2004) and Fazzini v. Northeast Ohio Correctional Center, ___ F.3d ___ (6th Cir. December 28, 2006), plaintiff alleged a sufficient effort to exhaust his administrative remedies. Defendants' objection cites to neither of these cases but reiterates the argument that exhaustion cannot occur unless a response has been given to each grievance filed by a prisoner. Under those cases, that does not appear to be a correct statement of the law. See Boyd, 380 F.3d at 996 ("we conclude that administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance"). Further, the argument that a prisoner must both plead and prove exhaustion of administrative remedies in order to withstand a motion to dismiss has been substantially undercut by the Supreme Court's recent decision in Jones v. Bock, ___ S.Ct. ___, 2007 WL 135890 (U.S. Jan

22, 2007). For all of these reasons, the objections are not well-taken.

Based on the foregoing, the Magistrate Judge's Report and Recommendation (#13) is ADOPTED and the defendants' objections are OVERRULED. The motion to dismiss (#10) is DENIED. Those defendants who have been properly served with the complaint shall file an answer within ten (10) days. See Fed. R. Civ. P. 12(a)(4)(A).

It is so ORDERED.

s/James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: January 24, 2007